

FCC MAIL SECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

Aug 11 4 55 AM '04

In the Matter of )  
 )  
Communications Assistance for ) ET Docket No. 04-295  
Law Enforcement Act and )  
Broadband Access and Services ) RM-10865

DISPATCHED

**NOTICE OF PROPOSED RULEMAKING AND DECLARATORY RULING****Adopted: August 4, 2004****Released: August 9, 2004****Comment Date: [45 days from publication in the Federal Register]****Reply Comment Date: [75 days from publication in the Federal Register]**

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements;  
Commissioners Copps and Adelstein concurring and issuing separate statements.

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## I. INTRODUCTION

1. Through this proceeding, we launch a thorough examination of the appropriate legal and policy framework of the Communications Assistance for Law Enforcement Act ("CALEA"). We initiate this proceeding at the request of, and in response to, a joint petition filed by the Department of Justice ("DoJ"), Federal Bureau of Investigation ("FBI"), and the Drug Enforcement Administration ("DEA") (collectively, "Law Enforcement").<sup>1</sup> In the *Notice of Proposed Rulemaking* ("Notice"), we examine issues relating to the scope of CALEA's applicability to packet-mode services, such as broadband Internet access, and implementation and enforcement issues. We tentatively conclude that: (1) Congress intended the scope of CALEA's definition of "telecommunications carrier" to be more inclusive than that of the Communications Act; (2) facilities-based providers of any type of broadband Internet access service, whether provided on a wholesale or retail basis, are subject to CALEA; (3) "managed" Voice over Internet Protocol ("VoIP") services are subject to CALEA; (4) the phrase in section 102 of CALEA "a replacement for a substantial portion of the local telephone exchange service" calls for assessing the replacement of any portion of an individual subscriber's functionality previously provided via "plain old telephone service" ("POTS"); and (5) call-identifying information in packet networks is "reasonably available" under section 103 of CALEA if the information is accessible without "significantly modifying a network." We seek comment on: (1) the feasibility of carriers relying on a trusted third party to manage their CALEA obligations and to provide to law enforcement agencies ("LEAs") the electronic surveillance information they require in an acceptable format; and (2) whether standards for packet technologies are deficient and should not serve as safe harbors for complying with section 103 capability requirements.

2. We also propose mechanisms to ensure that telecommunications carriers comply with CALEA. Specifically, we propose to restrict the availability of compliance extensions under CALEA section 107(c) and clarify the role and scope of CALEA section 109, which addresses the payment of costs of carriers to comply with the section 103 capability requirements. Additionally, we consider whether, in addition to the enforcement remedies through the courts available to LEAs under CALEA section 108, we may take separate enforcement action against carriers that fail to comply with CALEA. We tentatively conclude that carriers are responsible for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities; seek comment on cost recovery issues for wireline, wireless and other carriers; and refer to the Federal-State Separations Joint Board cost recovery issues for carriers subject to Title II of the Communications Act. In the companion *Declaratory Ruling*, we clarify that commercial wireless "push-to-talk" services continue to be subject to CALEA, regardless of the technologies that Commercial Mobile Radio Service ("CMRS") providers choose to apply in offering them.

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<sup>1</sup>See "Joint Petition for Expedited Rulemaking," RM-10865, filed March 10, 2004 ("Petition"). We stress that the tentative conclusions we reach in the instant proceeding in no way predispose how the Commission may proceed with respect to adopting a regulatory framework for Internet Protocol ("IP")-enabled and broadband services or determining their legal classification under the Communications Act. See, e.g., *IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004) (*IP-Enabled Services Notice*); *Wireline Broadband NPRM*, *infra* n.81 (noting other broadband proceedings and initiatives within the Commission); see also SBC Communications, Inc. ("SBC") Comments at 4-5 (urging us to clarify that a classification under CALEA does not affect classification under the Communications Act).

3. Since 1970, telecommunications carriers have been required to cooperate with LEAs to assist their conduct of electronic surveillance.<sup>2</sup> Advances in technology, however, most notably the introduction of digital transmission and processing techniques and the proliferation of wireless and Internet services, such as broadband access services, have challenged the ability of LEAs to conduct lawful surveillance. CALEA, enacted in October 1994, was intended to preserve the ability of LEAs to conduct electronic surveillance by requiring that telecommunications carriers and manufacturers of such equipment modify and design their equipment, facilities, and services to ensure that they have the required surveillance capabilities.<sup>3</sup>

4. In this proceeding we are guided by the following principles and policy goals.<sup>4</sup> First, it is the Commission's primary policy goal to ensure that LEAs have all of the resources that CALEA authorizes to combat crime and support Homeland Security. Second, the Commission recognizes that Law Enforcement's needs must be balanced with the competing policies of avoiding impeding the development of new communications services and technologies and protecting customer privacy. Section 103 of CALEA explicitly precludes LEAs from prohibiting the adoption of any equipment, facility, service, or feature by any telecommunications provider, manufacturer, or support service; and also protects the privacy and security of communications and call-identifying information not authorized to be intercepted. Third, the Commission intends to remove to the extent possible any uncertainty that is impeding CALEA compliance, particularly for packet-mode technology.

## II. BACKGROUND

5. Jurisdiction to implement CALEA's provisions is shared by the Attorney General of the United States, who consults with state and local LEAs, and the Federal Communications Commission. Effective implementation of CALEA's provisions relies to a large extent on shared responsibility among these governmental agencies and the service providers and manufacturers subject to the law's requirements.

6. The various statutory provisions of CALEA are focused on the following topics: assistance capability to LEAs, system capacity for simultaneous wiretaps, implementation and enforcement. We provide below an overview of CALEA's statutory provisions as well as the regulatory actions taken by the Attorney General, acting through DoJ and the FBI, and the Commission to implement certain statutory provisions. We also describe the Petition recently filed by Law Enforcement, which focuses on a broad range of issues. Accordingly, the remainder of this section includes a substantial amount of background material essential to the understanding of our subsequent proposals.

7. *Assistance Capabilities.* CALEA requires telecommunications carriers and manufacturers of such equipment to meet certain assistance capability requirements in support of electronic surveillance.

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<sup>2</sup>18 U.S.C. § 2518(4).

<sup>3</sup>Section 103(a)(1)-(4) of CALEA, 47 U.S.C. § 1002(a)(1)-(4).

<sup>4</sup>In enacting CALEA, Congress sought to balance three important policies: "(1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies." H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 13 (1994) ("House Report").

"Telecommunications carrier," which is defined in subsection 102(8)(A)-(C),<sup>5</sup> is "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire." Telecommunications carriers include commercial mobile service providers<sup>6</sup> or "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title."<sup>7</sup>

8. In the *Second Report and Order* ("*Second R&O*") in CC Docket No. 97-213, the Commission concluded that the language and legislative history of CALEA provide sufficient guidance as to what the term "telecommunications carrier" means, such that it can be applied to particular carriers, their offerings and facilities.<sup>8</sup> The *Second R&O* also stated that resellers, as telecommunications carriers under the terms of section 102, are generally subject to CALEA – however, resellers are not responsible for the CALEA compliance responsibilities of a carrier whose services they are reselling with respect to that carrier's underlying facilities.<sup>9</sup> The *Second R&O* further stated that CALEA does not apply to certain entities and services, e.g. information services and private network services.<sup>10</sup> Additionally, the *Second R&O* stated that CALEA's definitions of "telecommunications carrier" and "information services" were not modified by the Telecommunications Act of 1996, and that the CALEA definitions therefore remain in force. The *Second R&O* concluded as a matter of law that the entities and services subject to CALEA must be based on the CALEA definitions, independently of their classification for the separate purposes of the Communications Act.<sup>11</sup>

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<sup>5</sup>47 U.S.C. § 1001(8).

<sup>6</sup>See 47 U.S.C. § 332(d).

<sup>7</sup>See 47 U.S.C. § 1001(8)(B)(ii). Exempt from this definition are entities insofar as they provide information services and any category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General. See 47 U.S.C. § 1001(8)(C).

<sup>8</sup>*Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Second Report and Order*, 15 FCC Rcd 7105 (2000), at 7110, ¶ 9. The *Second R&O* stated that the legislative history contains examples of the types of service providers subject to CALEA: "The definition of 'telecommunications carrier' includes such service providers as local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, providers of personal communications services, satellite-based service providers, cable operators, and electric and other utilities that provide telecommunications services for hire to the public, and any other wireline or wireless service for hire to the public." *Id.* at 7111, ¶ 10, citing 140 Cong. Rec. H-10779 (daily ed. October 7, 1994) (statement of Rep. Hyde). See also H.R. Rep. No. 103-827(I), at 23, reprinted in 1994 U.S.C.C.A.N. 3489, 3500.

<sup>9</sup>*Second R&O*, *supra* n.8 at 7118, ¶ 24.

<sup>10</sup>*Id.* at 7112, ¶ 12

<sup>11</sup>*Id.* at 7112, ¶ 13. The Commission later clarified, in an Order on Reconsideration of the *Second R&O*, the CALEA obligations of resellers who rely on the facilities of an underlying carrier that does not provide telecommunications service for purposes of CALEA. Specifically, the Commission stated that under such circumstances, a non-facilities based reseller of telecommunications services is not exempt from "its overall obligation to ensure that its services satisfy all the assistance capability requirements of section 103." *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Second Order on Reconsideration*, (continued....)

9. Section 103 of CALEA establishes four general "assistance capability requirements" that telecommunications carriers must meet to achieve compliance with CALEA.<sup>12</sup> Subsection 103(a) requires, in pertinent part, that a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of:

(1) expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to intercept, to the exclusion of any other communications, all wire and electronic communications carried by the carrier within a service area to or from equipment, facilities, or services of a subscriber of such carrier concurrently with their transmission to or from the subscriber's equipment, facility, or service, or at such later time as may be acceptable to the government;

2) expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to access call-identifying information that is reasonably available<sup>13</sup> to the carrier (a) before, during, or immediately after the transmission of a wire or electronic communication (or at such later time as may be acceptable to the government) and (b) in a manner that allows it to be associated with the communication to which it pertains;

(3) delivering intercepted communications and call-identifying information to the government, pursuant to a court order or other lawful authorization, in a format such that they may be transmitted by means of equipment, facilities, or services procured by the government to a location other than the premises of the carrier; and

(4) facilitating authorized communications interceptions and access to call-identifying information unobtrusively and with a minimum of interference with any subscriber's telecommunications service and in a manner that protects (a) the privacy and security of communications and call-identifying information not authorized to be intercepted and (b) information regarding the government's interception of communications and access to call-identifying information.<sup>14</sup>

10. There are certain limitations on the assistance capability requirements in section 103(a). For example, they do not apply to information services or equipment, facilities or services that support the

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16 FCC Rcd 8959 (2001) at 8971, ¶ 37. The Commission also noted that when "a reseller does not resell the services of a facilities-based carrier subject to CALEA, it can contract with its facilities provider or third parties for CALEA assistance capabilities in the same way it contracts for any other network capabilities." *Id.* at 8971, ¶ 38.

<sup>12</sup>Section 103(a)(1)-(4) of CALEA, 47 U.S.C. § 1002(a)(1)-(4).

<sup>13</sup>CALEA does not define or interpret the term "reasonably available."

<sup>14</sup>47 U.S.C. § 1002(a)(1)-(4). "Call-identifying information" is defined in section 102(2) of CALEA as "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." 47 U.S.C. § 1001(2). For a discussion of call-identifying information, see ¶¶ 64-68, *supra*.

transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers.<sup>15</sup> Further, CALEA does not authorize a LEA to require any specific design of equipment, facilities, services, features or system configurations to be adopted by a provider of communication service, manufacturer of telecommunications equipment, or provider of telecommunications support services, nor to prohibit such entities from adopting any equipment, facility, service or feature.<sup>16</sup> Finally, a telecommunications carrier is not responsible for decrypting, or ensuring a LEA's ability to decrypt, any communication encrypted by a subscriber or customer, unless the encryption was provided by the carrier and the carrier has the information necessary to decrypt the communication.<sup>17</sup>

11. Achieving compliance with the assistance capability requirements in section 103 can be accomplished in various ways, and telecommunications carriers and manufacturers share responsibility in this regard. Subsection 106(a) states that a carrier is required to consult with manufacturers of its transmission and switching equipment and its providers of support services for the purpose of ensuring that current and planned equipment, facilities, and services comply with the capability requirements of section 103 and the capacity requirements identified by the Attorney General under section 104.<sup>18</sup> Subsection 106(b) states that manufacturers and providers of support services are required, on a reasonably timely basis and at a reasonable charge, to make available to carriers that use their equipment, facilities, or services such features or modifications as are necessary to permit such carriers to comply with the capability requirements of section 103 and the capacity requirements identified by the Attorney General under section 104.<sup>19</sup>

12. Individual carriers are free to choose any technical solution that meets the assistance capability requirements of CALEA, whether based on an industry standard or not. Carriers, therefore, have some degree of flexibility in deciding how they will comply with the section 103 requirements.<sup>20</sup> Subsection 107(a)(2) of CALEA contains a "safe harbor" provision, stating that "[a] telecommunications carrier shall be found to be in compliance with the assistance capability requirements under section 103, and a manufacturer of telecommunications transmission or switching equipment or a provider of telecommunications support services shall be found to be in compliance with section 106, if the carrier, manufacturer, or support service provider is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission under subsection (b), to meet the requirements of section 103."<sup>21</sup> Subsection 107(b) authorizes the Commission, upon petition, to establish rules, technical requirements or standards necessary for implementing section 103 if industry associations or standard-setting organizations fail to issue technical

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<sup>15</sup>47 U.S.C. § 1002(b)(2).

<sup>16</sup>47 U.S.C. § 1002(b)(1).

<sup>17</sup>47 U.S.C. § 1002(b)(3).

<sup>18</sup>47 U.S.C. § 1005(a).

<sup>19</sup>47 U.S.C. § 1005(b).

<sup>20</sup>See H.R. Rep. No. 103-827, 103rd Cong., 2d Sess., pt. 1, at 3507 (1994) ("Compliance with the industry standard is voluntary not compulsory. Carriers can adopt other solutions for complying with the capability requirements.")

<sup>21</sup>47 U.S.C. § 1006(a)(2).

requirements or standards or if a Government agency or any other person believes that such requirements or standards are deficient.<sup>22</sup>

13. Following CALEA's enactment, Subcommittee TR45.2 of the Telecommunications Industry Association ("TIA") developed an interim standard, J-STD-025 ("J-Standard") to serve as the safe harbor for wireline, cellular, and broadband Personal Communications Services ("PCS") carriers and manufacturers under subsection 107(a)(2). The J-Standard defines services and features required by these carriers to support lawfully authorized electronic surveillance, and specifies interfaces necessary to deliver intercepted communications and call-identifying information to LEAs.<sup>23</sup> Several parties filed petitions for rulemaking with the Commission, pursuant to subsection 107(b), contending that the J-Standard was either overinclusive or underinclusive.

14. In an August 1999 *Third Report and Order (Third R&O)* in CC Docket No. 97-213, the Commission required that wireline, cellular, and broadband PCS carriers implement all electronic surveillance capabilities of the J-Standard, including two contested features of that standard – a packet-mode communications capability<sup>24</sup> and a location information capability<sup>25</sup> – and six of nine additional capabilities requested by DoJ/FBI, known as the "punch list."<sup>26</sup> The Commission required that all

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<sup>22</sup>A party may petition the Commission to establish, by rule, technical requirements or standards that –

- (1) meet the assistance capability requirements of section 103 by cost-effective methods;
  - (2) protect the privacy and security of communications not authorized to be intercepted;
  - (3) minimize the cost of such compliance on residential ratepayers;
  - (4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and
  - (5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period.
- 47 U.S.C. § 1006(b).

<sup>23</sup>J-STD-025, *Lawfully Authorized Electronic Surveillance*, was jointly published in December 1997 by TIA and Committee T1, sponsored by the Alliance for Telecommunications Industry Solutions.

<sup>24</sup>Section 3 of the J-Standard describes packet-mode as a "communication where individual packets or virtual circuits of a communication within a physical circuit are switched or routed by the accessing telecommunication system. Each packet may take a different route through the intervening network(s)."

<sup>25</sup>The J-Standard includes a parameter that identifies the location of a subject's "mobile terminal" whenever this information is reasonably available and its delivery to a LEA is legally authorized. Location information is available to the LEA irrespective of whether a call content channel or a call data channel is employed. See J-STD-025 at § 6.4.6 and §§ 5.4.1-5.4.8, Tables 1, 5, 6, and 8.

<sup>26</sup>*Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Third Report and Order*, 14 FCC Rcd 16794 (1999). The six required punch list capabilities were "dialed digit extraction," which would provide to LEAs those digits dialed by a subject after the initial call setup is completed, *id.* at 16842, ¶ 112; "party hold/join/drop," which would provide to LEAs information to identify the active parties to a conference call, *id.* at 16825, ¶ 68; "subject-initiated dialing and signaling," which would provide to LEAs access to all dialing and signaling information available from the subject, such as the use of flash-hook and other feature keys, *id.* at 16828, ¶ 76; "in-band and out-of-band signaling," which would provide to LEAs information about tones or other network signals and (continued....)

uncontested capabilities covered by the J-Standard, as well as the contested location information capability, be implemented by June 30, 2000,<sup>27</sup> and further required that the contested packet-mode communications capability and the six punch list capabilities be implemented by September 30, 2001.<sup>28</sup> Subsequently, the Commission granted an extension of the packet-mode compliance deadline until November 19, 2001, and temporarily suspended the punch list compliance deadline.<sup>29</sup>

15. The United States Telecom Association and others petitioned the United States Court of Appeals for the District of Columbia Circuit ("Court") for review of the *Third R&O*. Petitioners challenged the legality of the packet-mode capability requirement, the location information requirement, and four of the six punch list requirements.<sup>30</sup> In its August 2000 *Remand Decision*, the Court affirmed the Commission's findings in the *Third R&O* in part and vacated and remanded in part for further proceedings.<sup>31</sup> In an April 2002 *Order on Remand*, the Commission responded to the Court's decision and found that all four vacated punch list capabilities are authorized by CALEA and must be provided by wireline, cellular, and broadband PCS carriers by June 30, 2002. The Commission also required that the two additional punch list capabilities that were mandated by the *Third R&O* but not reviewed by the Court be provided by that same date.<sup>32</sup> The *Order on Remand* was not appealed.

16. *Capacity*. Section 104 of CALEA sets forth notices of maximum and actual capacity requirements to accommodate all electronic surveillance events that telecommunications carriers may need to conduct for LEAs.<sup>33</sup> Subsection 104(b) requires that telecommunications carriers ensure that they were

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messages that a subject's service sends to the subject or associate, such as notification that a line is ringing or busy, *id.* at 16830, ¶ 83; "subject-initiated conference calls," which would provide to LEAs the content of conference calls supported by the subject's service, *id.* at 16821, ¶ 58; and "timing information," which would provide to LEAs information necessary to correlate call-identifying information with call content, *id.* at 16833, ¶ 90. The publishers of the J-Standard subsequently issued a revised standard – J-STD-025-A – that incorporated the changes adopted by the Commission in its *Third R&O*. The revised J-Standard was issued in May 2000.

<sup>27</sup>*Third R&O* at 16802, 16816; ¶¶ 13 and 46.

<sup>28</sup>*Id.* at 16819, 16849; ¶¶ 55 and 129.

<sup>29</sup>*See Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Order*, 16 FCC Rcd 17397 (2001).

<sup>30</sup>The four challenged punch list requirements were dialed digit extraction, party hold/join/drop, subject-initiated dialing and signaling, and in-band and out-of-band signaling.

<sup>31</sup>*See United States Telecom Association v. FCC*, 227 F.3d 450 (D.C. Cir. 2000) (hereinafter "*Remand Decision*"). The *Remand Decision* is available at <http://www.fcc.gov/ogc/documents/opinions/2000/99-1442.html>.

<sup>32</sup>*Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Order on Remand*, 17 FCC Rcd 6896 (2002).

<sup>33</sup>Under subsection 104(a) the Attorney General was required, within one year of CALEA's enactment, to publish in the Federal Register and provide to appropriate telecommunications industry associations and standard-setting organizations notice of the actual number of communication interceptions, pen registers, and trap and trace devices that the Attorney General estimated would be conducted within four years of CALEA's enactment, as well as the estimated maximum capacity required after that date. Subsection 104(c) requires that the Attorney General periodically publish in the Federal Register, after notice and comment, notice of any necessary increases in the maximum capacity requirements. Subsection 104(d) requires that, within 180 days after publication by the Attorney General of a notice of capacity requirements pursuant to either subsections 104(a) or 104(c),  
(continued....)

capable of accommodating simultaneously the actual number of interceptions, pen registers, and trap and trace devices estimated by the Attorney General, as well as expanding to the estimated maximum capacity required thereafter.<sup>34</sup> The FBI adopted a *Final Notice of Capacity*<sup>35</sup> in 1998, which describes LEAs' capacity requirements for local exchange carriers ("LECs"), cellular carriers, and broadband PCS carriers. These carriers were required to comply by March 12, 2001. In 2002, the United States Court of Appeals for the District of Columbia Circuit remanded for further explanation two issues from the *Final Notice of Capacity*.<sup>36</sup> The FBI recently published the explanation in the Federal Register.<sup>37</sup> In 1998, the FBI published a *Notice of Inquiry* seeking comment on capacity requirements for other service, such as paging, mobile satellite services, specialized mobile radio, and enhanced specialized mobile radio.<sup>38</sup> It published a *Further Notice of Inquiry* in 2000 on various issues related to establishing a notice of capacity for these additional services.<sup>39</sup> Further action on these matters is pending.

17. *Implementation.* CALEA contains several provisions concerning extensions of compliance dates, reimbursement of costs by the Attorney General, and system security and integrity requirements for and cost recovery by common carriers. Section 107(c) sets forth procedures to extend the date to comply with the assistance capability requirements in section 103, which was established as four years from the date of CALEA's enactment.<sup>40</sup> A telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility, or service prior to the effective date of section 103 may petition the Commission for one or more extensions of the deadline for complying with the assistance capability requirements under section 103. The Commission may, after consultation with the Attorney General, grant an extension for no longer than two years, if the Commission determines that compliance with the assistance capability requirements under section 103 is not reasonably achievable through application of technology available within the compliance period.<sup>41</sup>

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telecommunications carriers submit to the Attorney General statements identifying any systems or services that do not have the capacity to accommodate simultaneously the number of interceptions, pen registers, and trap and trace devices set forth in the Attorney General's notices. Subsection 104(e) requires that the Attorney General review the statements submitted under subsection 104(d) and states that the Attorney General may, subject to the availability of appropriations, agree to reimburse a telecommunications carrier for costs directly associated with modifications to attain such capacity requirements that are determined to be reasonable in accordance with section 109(e) of CALEA. Until the Attorney General agrees to reimburse such carrier for such modification, that carrier shall be considered to be in compliance under subsections 104(a) or 104(c). 47 U.S.C. §§ 1003(a), (c)-(e).

<sup>34</sup> 47 U.S.C. § 1003(b).

<sup>35</sup> 63 Fed. Reg. 12,218 (1998).

<sup>36</sup> *United States Telecom. Association v. FBI, et al.*, No. 00-5386.

<sup>37</sup> 68 Fed. Reg. 68,112 (2003).

<sup>38</sup> 63 Fed. Reg. 70,160 (1998).

<sup>39</sup> 65 Fed. Reg. 40,694 (2000).

<sup>40</sup> Sections 103 (concerning assistance capability) and 105 (concerning system security) took effect four years after the date of enactment of CALEA; all other provisions took effect on the date of enactment. 47 U.S.C. § 1001(b).

<sup>41</sup> See 47 U.S.C. §§ 1006(c)(1)-(3).

18. The Commission has issued several *Public Notices* describing procedures for telecommunications carriers that may need to file petitions for extension of the compliance deadline of the assistance capability requirements of section 103 of CALEA. Prior to issuing the *Order on Remand*, the Commission in April 2000 issued a *Public Notice* with instructions linked to the FBI's Flexible Deployment Program under which the FBI reviews extension requests in light of the electronic surveillance priorities of LEAs.<sup>42</sup> In September 2001, the Commission's Common Carrier (now Wireline Competition) and Wireless Telecommunications Bureaus issued a *Public Notice* that established procedures for carriers to submit or supplement CALEA subsection 107(c) petitions, both generally and with respect to packet-mode and other safe harbor standards.<sup>43</sup> Finally, in November 2003, the Commission's Wireline Competition and Wireless Telecommunications Bureaus issued a *Public Notice* pertaining to pending packet-mode extension petitions.<sup>44</sup>

19. Section 109 of CALEA addresses the payment of costs by the Attorney General to telecommunications carriers who comply with the capability requirements of section 103. The statute distinguishes between equipment, facilities and services installed or deployed on or before January 1, 1995, and after that date. Subsection 109(a) states that the Attorney General may, subject to the availability of appropriations,<sup>45</sup> agree to pay telecommunications carriers for all reasonable costs directly associated with the modifications performed by carriers in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995, to establish the capabilities necessary to comply with section 103.<sup>46</sup> Subsection 109(d) states that, if a carrier has requested payment in accordance with procedures promulgated pursuant to subsection 109(e) and the Attorney General has not agreed to pay that carrier for all reasonable costs directly associated with modifications necessary to bring any equipment, facility, or service deployed on or before January 1, 1995 into compliance with the assistance capability requirements of section 103, such equipment, facility, or service shall be considered to be in compliance with the capability requirements until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modification.<sup>47</sup> The FBI issued in 1998 a *Notice of Proposed Rulemaking*<sup>48</sup> proposing definitions for "significant upgrade or major modification" and a *Supplemental Notice of*

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<sup>42</sup>CALEA Section 103 Compliance and Section 107(c)(2) Petitions, *Public Notice*, 15 FCC Rcd 7482 (2000).

<sup>43</sup>*The Common Carrier and Wireless Telecommunications Bureaus Establish Procedures for Carriers to Submit or Supplement CALEA Section 107(c)(2) Extension Petitions, both Generally and with Respect to Packet-Mode and Other Safe Harbor Standards*, CC Docket No. 97-213, *Public Notice*, 16 FCC Rcd 17101 (2001) (9/28/01 *Public Notice*).

<sup>44</sup>*The Wireline Competition and Wireless Telecommunications Bureaus Announce a Revised Schedule for Consideration of Pending Packet Mode CALEA Section 107(c) Petitions and Related Issues*, CC Docket No. 97-313, 2003 WL 22717863, *Public Notice*, 22 FCC Daily Dig. 220 (rel. Nov. 19, 2003) (11/19/03 *Public Notice*).

<sup>45</sup>Congress authorized appropriations totaling \$500 million for fiscal years 1995 through 1998. 47 U.S.C. § 1009. The Attorney General shall allocate funds appropriated to carry out this title in accordance with law enforcement priorities determined by the Attorney General. 47 U.S.C. § 1008(e).

<sup>46</sup>47 U.S.C. § 1008(a).

<sup>47</sup>47 U.S.C. § 1008(d).

<sup>48</sup>63 Fed. Reg. 23,231 (1998).

*Proposed Rulemaking*<sup>49</sup> in 2001 regarding definitions of “replaced” and “significantly upgraded or otherwise undergoes major modification.” Action in these rulemakings is pending. In addition, the FBI entered into nationwide right-to-use (“RTU”) license agreements with a number of manufacturers for high priority switching platforms. The Federal Government paid some manufacturers to develop software solutions that carriers receive at a nominal charge.<sup>50</sup> Overall, these RTUs have made software available for the vast majority of Law Enforcement’s priority pre-January 1, 1995 switches.

20. Subsection 109(b)(1) states that, with regard to equipment, facilities, and services deployed after January 1, 1995, the Commission, on petition from a telecommunications carrier or any other interested person, and after notice to the Attorney General, must determine whether compliance with the assistance capability requirements of section 103 is reasonably achievable with respect to any equipment, facility, or service deployed after January 1, 1995. The Commission is required to make this determination within one year after a petition is filed. In making its determination, the Commission is required to evaluate whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier’s systems and must consider eleven factors.<sup>51</sup>

21. Subsection 109(b)(2) states that, if compliance with the assistance capability requirements of section 103 is not reasonably achievable with respect to any equipment, facility, or service deployed after January 1, 1995, the Attorney General, on application of a telecommunication carrier, may agree, subject to the availability of appropriations, to pay that carrier for the additional reasonable costs of making compliance with the capability requirements reasonably achievable. If the Attorney General does not agree to pay such costs, that carrier shall be deemed to be in compliance with the capability requirements.<sup>52</sup> The FBI published in 1997 the *Cost Recovery Regulations* for payment of costs for assistance capability and capacity requirements.<sup>53</sup>

22. CALEA modified the Communications Act by adding new section 229 concerning CALEA compliance, particularly regarding system security and integrity and cost recovery, which provides in subsection 229(a) that the Commission shall prescribe such rules as are necessary to implement the

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<sup>49</sup>66 Fed. Reg. 50931 (2001).

<sup>50</sup>There are RTU licenses with AG Communications Systems, Lucent Technologies, Motorola, Nortel Networks, and Siemens AG.

<sup>51</sup>Those factors are (1) the effect on public safety and national security; (2) the effect on rates for basic residential telephone service; (3) the need to protect the privacy and security of communications not authorized to be intercepted; (4) the need to achieve the capability assistance requirements of section 103 by cost-effective methods; (5) the effect on the nature and cost of the equipment, facility, or service at issue; (6) the effect on the operation of the equipment, facility, or service at issue; (7) the policy of the United States to encourage the provision of new technologies and services to the public; (8) the financial resources of the telecommunications carrier; (9) the effect on competition in the provision of telecommunications services; (10) the extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995; and (11) such other factors as the Commission determines are appropriate. 47 U.S.C. § 1008(b)(1).

<sup>52</sup>47 U.S.C. § 1008(b)(2). Subsection 109(e) sets forth the regulations necessary to effectuate timely and cost-efficient payment to carriers that are entitled to compensation under this title. 47 U.S.C. § 1008(e).

<sup>53</sup>28 C.F.R. pt. 100 (1997); see also 64 Fed. Reg. 72,689 (1999) and 65 Fed. Reg. 13,792 (2000).

requirements of CALEA.<sup>54</sup> The basic requirement for system security and integrity is contained in section 105 that requires a telecommunications carrier to ensure that any interception of communications or access to call-identifying information within its switching premises can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.<sup>55</sup> The Commission established these systems and security and integrity regulations in March 1999, and carriers' policies and procedures are on file with the Commission.<sup>56</sup>

23. Cost recovery for CALEA compliance by common carriers is addressed by subsection 229(e)(1), which states a common carrier may petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of section 103 of CALEA.<sup>57</sup> Subsection 229(e)(2) states that the Commission may grant, with or without modification, a petition under subsection 229(e)(1) if the Commission determines that such costs are reasonable and that permitting recovery is consistent with the public interest.<sup>58</sup>

24. *Enforcement.* Section 108 of CALEA deals with enforcement orders. Subsection 108(a) states that a court is permitted to issue an enforcement order to a carrier only if the court finds that –

(1) alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception of communications or access to call-identifying information; and

(2) compliance is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken.<sup>59</sup>

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<sup>54</sup>47 U.S.C. § 229(a).

<sup>55</sup>47 U.S.C. § 1004. Subsection 229(b) states that the Commission shall prescribe rules to implement section 105 that require common carriers to establish policies and procedures for officers and employees to perform interceptions or access call-identifying information, to maintain secure and accurate records of interceptions, and to file with the Commission descriptions of the policies and procedures it has put in place. Subsections 229 (c) and (d) provide the Commission with authority to review and modify carriers' policies and procedures and to impose penalties on carriers that violate their system security and integrity provisions. 47 U.S.C. §§ 229(b), 229(c), 229(d).

<sup>56</sup>See *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Report and Order*, 14 FCC Rcd 4151 (1999), *recon. sua. sponte, Order on Reconsideration*, 15 FCC Rcd 20735 (2000).

<sup>57</sup>47 U.S.C. § 229(e)(1).

<sup>58</sup>47 U.S.C. § 229(e)(2).

<sup>59</sup>47 U.S.C. § 1007(a). Subsection 108(b) states that, upon issuing an order, the court must specify a reasonable time and conditions for complying with its order, considering good faith efforts to comply in a timely manner, any effect on the carrier's, manufacturer's, or service provider's ability to continue to do business, the degree of culpability or delay in undertaking efforts to comply, and such other matters as justice may require. 47 U.S.C. § 1007(b). Subsection 108(c) states that a court order may not –

(1) require a telecommunications carrier to meet the Government's demand for interception of  
(continued....)

25. *Law Enforcement Petition.* In March 2004, Law Enforcement filed its Petition requesting that the Commission initiate a new rulemaking proceeding to resolve, on an expedited basis, various outstanding issues associated with the implementation of CALEA. In its Petition, Law Enforcement states, that although the Commission has taken steps to implement CALEA, there remain several outstanding issues. In order to resolve these issues, Law Enforcement asks the Commission to:

- (1) formally identify the types of services and entities that are subject to CALEA;
- (2) formally identify the services that are considered "packet-mode services;"
- (3) initially issue a Declaratory Ruling or other formal Commission statement, and ultimately adopt final rules, finding that broadband access services and broadband telephony services are subject to CALEA;
- (4) reaffirm, consistent with the Commission's finding in the *Second R&O*, that push-to-talk "dispatch" service is subject to CALEA;
- (5) adopt rules that provide for the easy and rapid identification of future CALEA-covered services and entities;
- (6) establish benchmarks and deadlines for CALEA packet-mode compliance;
- (7) adopt rules that provide for the establishment of benchmarks and deadlines for CALEA compliance with future CALEA-covered technologies;
- (8) outline the criteria for extensions of any benchmarks and deadlines for compliance with future CALEA-covered technologies established by the Commission;
- (9) establish rules to permit the Commission to request information regarding CALEA compliance generally;
- (10) establish procedures for enforcement actions by the Commission against entities that do not comply with their CALEA obligations;

(Continued from previous page)

communications and acquisition of call-identifying information to any extent in excess of the capacity for which the Attorney General has agreed to reimburse such carrier;

(2) require any telecommunications carrier to comply with the assistance capability requirements of section 103 if the Commission has determined that compliance is not reasonably achievable, unless the Attorney General has agreed to pay the costs described in section 109(b)(2)(a); or

(3) require a telecommunications carrier to modify, for the purpose of complying with the assistance capability requirements of section 103, any equipment, facility, or service deployed on or before January 1, 1995, unless (a) the Attorney General has agreed to pay the telecommunications carrier for all reasonable costs directly associated with modifications necessary to bring the equipment, facility, or service into compliance with those requirements, or (b) the equipment, facility, or service has been replaced or significantly upgraded or otherwise undergoes major modification. 47 U.S.C. § 1007(c).

- (11) confirm that carriers bear sole financial responsibility for CALEA implementation costs for post-January 1, 1995 communications equipment, facilities and services;
- (12) permit carriers to recover their CALEA implementation costs from their customers; and
- (13) clarify the cost methodology and financial responsibility associated with intercept provisioning.<sup>60</sup>

26. In its Petition, Law Enforcement contends that outstanding implementation issues require immediate attention and resolution by the Commission, so that industry and LEAs have clear guidance on CALEA as the implementation process moves forward. Law Enforcement further contends that initiating a rulemaking proceeding is consistent with the Commission's ongoing obligations under section 229(a) of the Communications Act to prescribe rules as necessary to implement CALEA.<sup>61</sup> Law Enforcement argues that developments since the *Second R&O* make it imperative for the Commission to revisit which services and entities are subject to CALEA. Specifically, Law Enforcement argues that the Commission and the District of Columbia Circuit Court have made clear that CALEA is applicable not only to entities and services that employ traditional circuit-mode technology, but also to entities and services that employ packet-mode technology; *i.e.*, technology in which the transmission or messages are divided into packets before they are sent, transmitted individually, and recompiled into the original message once all of the packets arrive at their destination. However, Law Enforcement maintains, the Commission has not yet made clear the specific types of packet-mode services that come within the scope of CALEA. Accordingly, Law Enforcement asks the Commission to reaffirm that packet-mode communications services are subject to CALEA and, having done so, to establish rules that formally identify the services and entities that are covered by CALEA, so that both LEAs and industry are on notice with respect to CALEA obligations and compliance.<sup>62</sup>

27. Law Enforcement maintains that the importance and the urgency of this task cannot be overstated because the ability of federal, state, and local LEAs to carry out critical electronic surveillance is being compromised today by providers who have failed to implement CALEA-compliant intercept capabilities. Law Enforcement asserts that communications among surveillance targets are being lost, and associated call-identifying information is not being provided in the timely manner required by CALEA. Law Enforcement further asserts that the Commission can resolve any controversy about CALEA's applicability to broadband access, broadband telephony, and push-to-talk dispatch services separately and independently from its proceedings addressing the classification of Internet Protocol ("IP")-enabled services under the Communications Act.<sup>63</sup>

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<sup>60</sup>Petition at iii-iv.

<sup>61</sup>*Id.* at 5.

<sup>62</sup>*Id.* at 6-8.

<sup>63</sup>*Id.* at 8-9. As discussed in n.1, *supra*, the Commission recently initiated a rulemaking proceeding to explore the appropriate legal and regulatory framework for various IP-enabled services. See also discussion, section III.B. *infra*, on the applicability of CALEA to new technologies and services.

28. LEAs strongly support the Petition,<sup>64</sup> arguing that CALEA was enacted to ensure that they have the ability to conduct electronic surveillance as communications technology changes. They contend that many providers of services using new technologies, such as broadband Internet access, VoIP telephony, and push-to-talk digital dispatch, have failed to voluntarily adopt CALEA intercept solutions and that LEAs have been thwarted in their attempts to implement lawfully authorized electronic surveillance. They also maintain that state and local LEAs do not have the financial or personnel resources to develop costly *ad hoc* surveillance solutions for each new service and that, for all equipment, services, and facilities deployed after January 1, 1995, CALEA expressly passed the burden of designing and paying for such surveillance solutions onto the telecommunications carriers themselves.<sup>65</sup>

29. Many other parties generally oppose the Petition. Some of these parties state that there is no need for the Commission to initiate either a rulemaking proceeding or issue a declaratory ruling to resolve outstanding issues associated with the implementation of CALEA, while others maintain that the Commission must develop a complete record on the issues set forth in the Petition prior to issuing any declaratory ruling.<sup>66</sup> Many opposing parties contend that the Petition asks the Commission to go beyond its statutory authority and make information services, such as broadband telephony, subject to CALEA.<sup>67</sup> Opposing parties also argue that grant of the Petition would have a harmful impact on innovation because such action would give to Law Enforcement the right to pre-approve new technologies and services.<sup>68</sup> Some opposing parties also maintain that there are technical problems inherent in translating CALEA's requirements into Internet services.<sup>69</sup> Additionally, opposing parties contend that the Petition's proposed enforcement scheme is flawed because it would grant excessive regulatory authority to LEAs and to the

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<sup>64</sup>The Petition was placed on *Public Notice* on March 12, 2004. See *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, DA 04-700. Comments were due by April 12, 2004, and reply comments were due by April 27, 2004. Commenting parties can generally be identified as LEAs, cable organizations, Internet and broadband companies/organizations, privacy and public interest groups, standards and technology groups, wireless companies/organizations, and wireline companies/organizations.

<sup>65</sup>See, e.g., Comments of Cape May Prosecutor's Office, Illinois State Police ("ILSP"), International Association of Chiefs of Police, Los Angeles County Regional Criminal Information Clearinghouse ("LA Clear"), Major Cities Chiefs Association, Maryland State Police ("MSP"), National District Attorneys Association ("NDAA"), National Narcotic Officers Association Coalition, National Sheriffs' Association, New Jersey State Police, New York State Attorney General's Office ("NYSAG"), Oklahoma State Bureau of Narcotics and Dangerous Drug Control, Police Executive Research Forum, Tennessee Bureau of Investigation, and Texas Department of Public Safety.

<sup>66</sup>See, e.g., Comments of American Civil Liberties Union ("ACLU") at 1; AT&T Corp. ("AT&T") at 3; BellSouth Corporation ("BellSouth") at 5-7; Electronic Frontier Foundation ("EFF") at 5; Electronic Privacy Information Center ("EPIC") at 9; Global Crossing North America ("Global Crossing") at 17; Information Technology Industry Council ("ITIC") at 2-3; Satellite Industry Association ("SIA") at 3, 15-18; SBC at 5-7; Sprint Corporation ("Sprint") at 2-3, 5-11; United States Telecom Association ("USTA") at 2-6.

<sup>67</sup>See, e.g., Comments of Cellular Telecommunications and Internet Association ("CTIA") at 3; Center for Democracy and Technology ("CDT") at iii-iv; SIA at 3-8; Covad Communications ("Covad") at 7,13; EFF at 7-8; Global Crossing at 3-5; TIA at 20; Voices on the Net Coalition ("VONC") at 13.

<sup>68</sup>See, e.g., Comments of ACLU at 2; CDT at iv; CTIA at 5; Covad at 14-15; EFF at 3; Global Crossing at 9-10; ITIC at 18-19; SIA at 11-12; TIA at 15-16; USTA at 6-8; VONC at 3.

<sup>69</sup>See, e.g., Comments of CDT at 2; EFF at 14; SBC at 7-10.

Commission.<sup>70</sup> Finally, opposing commenters argue that grant of the Petition would impose excessive costs on carriers and raise privacy concerns.<sup>71</sup>

### III. DISCUSSION

#### A. INTRODUCTION

30. We undertake this proceeding to examine the appropriate legal and policy framework of CALEA, particularly with respect to new packet mode technologies and services. Our intent is to remove to the extent possible any uncertainty that is impeding CALEA compliance. We recognize that many parties have spent much time and effort on CALEA solutions, often with successful results, but we think that the diversity of the comments filed in response to the Petition underscores Law Enforcement's argument that progress has been slow and uncertainty persists. Furthermore, we are sensitive to the law enforcement community's role in Homeland Security and the importance of electronic surveillance in fighting crime and terrorism.

31. Although laws other than CALEA provide LEAs with the necessary authority to conduct electronic surveillance, carriers subject to CALEA provide invaluable assistance for implementing surveillance by, for example, providing sufficient capacity on their networks, ensuring that a subject's communications are isolated and other customers' privacy is protected, and delivering to LEAs intercepted communications and related information that is timely and usable. However, we recognize that LEAs' needs must be balanced with the competing policies of avoiding impeding the development of new communications services and technologies and protecting customer privacy. We are committed to finding solutions that will allow carriers and manufacturers to find innovative ways to meet the needs of the law enforcement community without adversely affecting the dynamic telecommunications industry. In this regard, we observe that packet-mode and various types of broadband technology have become increasingly important in recent years and have led to a proliferation of new services. In particular, packet-mode technology often is used to provide the broadband connection used for accessing the Internet.

32. In its Petition, Law Enforcement requests that the Commission issue a Declaratory Ruling and ultimately adopt rules finding that CALEA applies to two closely related packet-mode services: "broadband access service" and "broadband telephony service."<sup>72</sup> Law Enforcement defines "broadband access service" as follows:

...the process and service used to gain access or connect to the public Internet using a connection based on packet-mode technology that offers high bandwidth. The term is intended to be inclusive of services that the Commission has previously defined as 'wireline broadband Internet access' and 'cable modem service' as well as other services providing the same function through different technology, such as wireless technology. The term does not include any 'information services' available to a user after he or she has been connected to the Internet, such as the content found on

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<sup>70</sup>See, e.g., Comments of AT&T at 19-20; BellSouth at 13-14; CTIA at 22-23; CDT at 29; SIA at 13-14; TIA at 12-13.

<sup>71</sup>See, e.g., Comments of AT&T at 4-5; BellSouth at 9; CTIA at 5, 25-26; CDT at 30; Covad at 18-19; EFF at 3, 18; EPIC at 2-8; Global Crossing at 15; Leap Wireless International, Inc. ("Leap") at 6-10; Rural Iowa Independent Telephone Association ("RIITA") at 1-2; SBC at 2; TIA at 25.

<sup>72</sup>Petition at 15.

Internet Service Providers' or other websites. 'Broadband access services' includes the platforms currently used to achieve broadband connectivity (e.g., wireline, cable modem, wireless, fixed wireless, satellite, and broadband access over power line) as well as any platforms that may in the future be used to achieve broadband connectivity.<sup>73</sup> (Footnotes omitted.)

Law Enforcement defines "broadband telephony service" as the transmission or switching of voice communications using broadband facilities.<sup>74</sup> The Petition describes various business models used for broadband telephony, which we discuss in more detail below, that it claims should be covered by CALEA.

33. As Law Enforcement requests, we reaffirm that CALEA is technology neutral and thus does encompass services provided using packet-mode technology. The Commission has previously noted that CALEA is technology neutral and that a carrier's choice of technology does not change its obligations under CALEA.<sup>75</sup> Carriers, manufacturers and LEAs have understood that CALEA's obligations would not be defeated if a carrier used packet-mode technology, and included in standard J-STD-025 some requirements for wireline, wireless and PCS carriers that deliver communications using several types of packet technologies. Further, the FBI expanded its Flexible Deployment Program to cover carriers' implementation of CALEA-compliant packet-mode technology, and carriers have filed requests with the Commission for extensions of time to bring their packet-mode networks into compliance.<sup>76</sup> We recognize, however, that not all packet-mode services or all entities involved in a packet-mode transmission may be subject to CALEA. The unique characteristics of packet-mode technology have allowed numerous applications to be developed, and several different entities may be involved in the transmission of a communication. The key question is whether the provider of the service is a "telecommunications carrier" subject to CALEA.

34. As set forth below, as a matter of policy and based on the record developed in response to the Petition, we reach a number of tentative conclusions regarding these statutory definitions and their application to particular types of services, and seek comment on these conclusions. We decline at this point, however, to enter an order establishing that "broadband access service" and "broadband telephony service" – as those terms are defined by Law Enforcement – are covered by CALEA. We believe the record in this proceeding needs to be more fully developed and weighed before a final determination is made. In particular, we seek additional legal and technical information regarding how best to apply these statutory definitions to specific categories of service and facilities. We do, however, clarify in a *Declaratory Ruling* that certain push-to-talk "dispatch" services are subject to CALEA.

35. In this *Notice*, we address the types of services and entities encompassed by the terms "broadband access service" and "broadband telephony service." We rely on Law Enforcement's definitions to a large extent in this endeavor. We attempt to identify services and processes that provide broadband access to the public Internet, focusing primarily on those services and entities using packet-mode technology. In this *Notice*, we refer to "broadband access service" and "broadband Internet access

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<sup>73</sup>*Id.* at 15-16.

<sup>74</sup>*Id.* at 16.

<sup>75</sup>*Second R&O, supra* n.8 at 7120 n.69.

<sup>76</sup>The FBI subsequently terminated the Flexible Deployment Program for packet-mode. *See also* discussion at ¶ 103, *infra*.

service” interchangeably. Law Enforcement does not define the term “broadband,” and thus we will rely on previous uses we have made of this term, *i.e.*, those services having the capability to support upstream or downstream speeds in excess of 200 kilobits per second (“kbps”) in the last mile.<sup>77</sup> Finally, this *Notice* addresses broadly CALEA compliance for any packet-mode application and focuses specifically on voice communications. We recognize that although broadband access for voice telephony communications could be provided using various packet-mode technologies, most packet voice communications in commercial use today are provided using the Internet Protocol and are commonly referred to as “VoIP.”<sup>78</sup> Thus, we will refer to VoIP rather than “broadband telephony service” in this *Notice*.

36. In this *Notice*, we also address several other issues raised by Law Enforcement. Law Enforcement urges the Commission to take a more active role in CALEA implementation by, for example, establishing benchmarks and deadlines for packet-mode compliance and enforcement of CALEA requirements. We seek comment on these proposals, as well as alternatives, all designed with the goal of moving carriers toward full CALEA compliance rapidly. We therefore explore alternative methods of achieving the same objective. Finally, LEAs are very concerned about the cost of conducting electronic surveillance and believe that increased rates for such surveillance might hamper their ability to rely on this important investigative tool. As the number of electronic surveillances has increased, so have the rates carriers charge LEAs. In this *Notice*, we clarify and seek comment on various cost and cost recovery issues.

## **B. APPLICABILITY OF CALEA TO BROADBAND INTERNET ACCESS AND VOIP SERVICES**

37. In this section, we tentatively conclude that facilities-based providers of any type of broadband Internet access service,<sup>79</sup> whether provided on a wholesale or retail basis,<sup>80</sup> are subject to CALEA because

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<sup>77</sup>The Commission has used the term “broadband” to signify “advanced telecommunications capability and advanced services,” which we defined, for the purposes of Section 706 Reports, as those services having the capability to support both upstream and downstream speeds in excess of 200 kbps in the last mile. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Third Report*, 17 FCC Rcd 2844, 2850-52, ¶ 9 (2002) (*Third Section 706 Report*); *accord Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Second Report*, 15 FCC Rcd 20913, 20919-20, ¶ 10 (2000) (*Second Section 706 Report*). The Commission also has “denominate[d] as ‘high-speed’ those services with over 200 kbps capability in at least one direction.” *Second Section 706 Report*, 15 FCC Rcd at 20920, ¶ 11; *accord Third Section 706 Report*, 17 FCC Rcd at 2850-51, ¶ 9. See also *IP-Enabled Services Notice*, 19 FCC Rcd 4865, n.3.

<sup>78</sup>Internet Protocol is the most commonly used language at the network layer of packet-mode architecture to route data between hosts over one or several networks.

<sup>79</sup>See *supra* ¶ 35 (defining “broadband Internet access service” for purposes of this proceeding). By “facilities-based,” we mean entities that provide transmission or switching over their own facilities between the end user and the Internet Service Provider. We seek comment on this approach.

<sup>80</sup>We clarify that some entities that sell or lease mere transmission facilities on a non-common carrier basis, *e.g.*, dark fiber, bare space segment capacity or wireless spectrum, to other entities that use such transmission capacity to provide a broadband Internet access service, are not subject to CALEA under the Substantial Replacement Provision as broadband Internet access providers. Under such a scenario, the entity procuring the (continued....)

they provide a replacement for a substantial portion of the local telephone exchange service used for dial-up Internet access service and treating such providers as telecommunications carriers for purposes of CALEA is in the public interest.<sup>81</sup> Broadband Internet access providers include, but are not limited to, wireline, cable modem, satellite, wireless, and broadband access via powerline companies.<sup>82</sup> We seek comment on this tentative conclusion. In addition, we tentatively conclude that providers of VoIP services that Law Enforcement characterizes as “managed” or “mediated” are subject to CALEA as telecommunications carriers under the Substantial Replacement Provision. Law Enforcement describes managed or mediated VoIP services as those services that offer voice communications calling capability whereby the VoIP provider acts as a mediator to manage the communication between its end points and to provide call set up, connection, termination, and party identification features, often generating or modifying dialing, signaling, switching, addressing or routing functions for the user.<sup>83</sup> Law Enforcement distinguishes managed communications from “non-managed” or “peer-to-peer” communications, which involve disintermediated communications that are set up and managed by the end user via its customer premises equipment or personal computer. In these non-managed, or disintermediated, communications, the VoIP provider has minimal or no involvement in the flow of packets during the communication, serving instead primarily as a directory that provides users’ Internet web addresses to facilitate peer-to-peer

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transmission capacity via the sale or lease and using it to provide broadband Internet access service (e.g., a satellite earth station licensee) would be considered the facilities-based broadband Internet access service provider and thus, the entity subject to CALEA under the Substantial Replacement Provision.

<sup>81</sup> See Petition at 15-16, 23-28. We note that in other dockets, the Commission previously requested and received comment on the applicability of CALEA to wireline broadband Internet access service and has received comment on its applicability to cable modem service. See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*); see also *supra* ¶ 35 (summarizing the fact that this proceeding encompasses the issue of the applicability of CALEA to wireline broadband Internet access previously raised in WC Docket No. 02-33); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 and CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling & NPRM*), *aff’d in part, vacated in part, and remanded, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), stay granted pending cert. (April 9, 2004) (cable modem service constitutes the offering of both an information service and a telecommunications service to the end user). Parties that commented on CALEA issues in these dockets should respond to the instant docket.

<sup>82</sup> Broadband Internet access services are rapidly being developed or provided over technologies other than wireline and cable, such as wireless and powerline. For example, broadband Internet access service may be provided by CMRS carriers and fixed wireless companies such as local multipoint distribution service and 39 GHz licensees, or by wireless Internet Service Providers using unlicensed spectrum. See, e.g., *FCC Chairman Michael K. Powell announces Formation Of Wireless Broadband Access Task Force*, News Release (May 5, 2004); *Wireless Broadband Access Task Force Seeks Public Comment On Issues Related To Commission’s Wireless Broadband Policies*, GN Docket No. 04-163, *Public Notice*, 19 FCC Rcd 8166 (2004). Broadband over powerline (“BPL”) is a new technology being developed at a rapid pace to offer voice and high-speed data capabilities. See, e.g., *Inquiry Regarding Carrier Current Systems, Including Broadband over Power Line Systems*, ET Docket No. 03-104, *Notice of Inquiry*, 18 FCC Rcd 8498 (2003) (seeking comment on technical issues relating to provision of BPL); see also generally United Power Line Council (“UPLC”) Comments at 1-2.

<sup>83</sup> See Petition at 16-17, n. 39.

communications.<sup>84</sup> We request comment on the appropriateness of this distinction between managed and non-managed VoIP communications for purposes of CALEA.

38. Law Enforcement asserts that CALEA applies to broadband Internet access service and mediated VoIP services and that application is critical to its efforts to combat crime and terrorism.<sup>85</sup> We base our tentative conclusion that those services are subject to CALEA on an analysis of the statute and its legislative history – which demonstrate that the meaning of “telecommunications carrier” in CALEA is broader than its meaning under the Communications Act – and on Congress’s stated intent “to preserve the government’s ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies such as digital or wireless transmission modes.”<sup>86</sup>

39. In classifying broadband Internet access and other packet-based services, we wish to identify and clarify areas that are outside the scope of this section. First, we do not disturb the Commission’s prior decisions that CALEA unambiguously applies to all “common carriers offering telecommunications services for sale to the public” as so classified under the Communications Act.<sup>87</sup> These common carriers are subject to CALEA regardless of the technology they deploy to offer their services, including packet-based technology.<sup>88</sup> Thus, we are not inviting comment on the applicability of CALEA to these providers and advise parties that we will hold such comment to be outside the scope of this proceeding. Furthermore, this inquiry in no way relates to the obligations of any entity, whether or not it is subject to CALEA, to

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<sup>84</sup> *Id.* (describing the various functions performed by a call mediator in a managed VoIP service); *see also* *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, *Memorandum Opinion and Order*, 19 FCC Rcd 3307 (2004) (*Pulver.com Declaratory Ruling*) at 3309-3310, ¶¶ 5-6 (distinguishing Pulver’s peer-to-peer Free World Dialup service from a managed VoIP service).

<sup>85</sup> *See* *Petition* at 2, 25, 71; *Law Enforcement Reply Comments* at iii, 22.

<sup>86</sup> H.R. Rep. No. 103-827(I) (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489 (*House Report*) (Summary and Purpose) (emphasis added); *see also* *Petition* at iii.

<sup>87</sup> *See Second R&O, supra* n.8 at 7111, 7114-15; ¶¶ 10, 17 (finding entities deemed to be common carriers under the Communications Act, including cable operators, electric and other utilities that offer telecommunications services to the public; CMRS providers interconnected to the public switched telephone network, private mobile radio service providers to the extent they offer common carrier service; resellers; joint-use facilities; and adjunct-to-basic services are all subject to CALEA); *see also House Report* at 23, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500 (listing numerous types of service providers that Congress explicitly intended to fall within its definition of “telecommunications carrier” under CALEA). Each of the entities identified in the *House Report* is a telecommunications carrier, *i.e.*, a common carrier, under the Communications Act. *See Cable & Wireless, PLC, Order*, 12 FCC Rcd 8516, 8521, ¶ 13 (1997); *see also Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999) (stating that the 1996 Act’s definition of telecommunications service equates to common carrier service).

<sup>88</sup> Law Enforcement correctly notes that the application of CALEA is technology neutral and commenters are reminded of this fact. *See* *Petition* at iii, 13; *see also supra* ¶ 33 (indicating that the Commission has acknowledged that CALEA is technology neutral). We further stress that these carriers remain subject to CALEA regardless of whether accepted industry standards or safe harbors have been adopted for their respective technologies. *See infra* section III.C. (discussing capability requirements and the role of standards). Thus, to be clear, to the extent any packet-based or broadband services are currently telecommunications services under the Communications Act or subsequently determined to be telecommunications services under the Communications Act, those services and the entities providing them are subject to CALEA pursuant to sections 102(8)(A) and (8)(B)(i).

respond to lawful instruments seeking information or cooperation with LEAs. These obligations attach under separate provisions of federal or state law and are not impacted by our inquiry here.<sup>89</sup> Finally, we point out that the question of what additional entities and services are covered by CALEA's definitions is separate from the question of whether these entities can provide all the capabilities listed in section 103.<sup>90</sup> Questions regarding capabilities, and the extent to which entities subject to CALEA are able to achieve these capabilities, are posed in a separate section of this *Notice*.<sup>91</sup>

## 1. Analysis of CALEA's Statutory Definitions

### a. "Telecommunications Carriers" under CALEA

40. CALEA requires "telecommunications carriers" to ensure that their equipment, facilities, and services are capable of providing surveillance capabilities to LEAs.<sup>92</sup> As noted above, CALEA contains its own unique definition of "telecommunications carrier."<sup>93</sup> For purposes of CALEA, a "telecommunications carrier" is "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire," but also includes entities that provide "a replacement for a substantial portion of the local telephone exchange service" (we refer to this latter clause as the "Substantial Replacement Provision") if the Commission deems those entities to be "telecommunications carriers" as well.<sup>94</sup>

<sup>89</sup>As noted above, LEAs may obtain a court warrant for wiretaps of electronic communications services under a number of laws. *See, e.g.*, Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848 (1986) (codified, as amended, at 18 U.S.C. §§ 2701 *et seq.*, 3121 *et seq.*; *see U.S. v. Kennedy*, 81 F. Supp. 2d 1103 (D. Kan. 2000) (granting government's application for an order to disclose consumer information); *In re Application of the United States of America for an Order pursuant to 18 U.S.C. 2703(d)*, 36 F. Supp. 2d 430 (D. Mass. 1999) (same); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 212 (1968) (codified, as amended, at 18 U.S.C. §§ 22510 *et seq.*); Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978) (codified, as amended, at 50 U.S.C. §§ 1801 *et seq.* and 1841 *et seq.*); Pen Registers and Trace Devices, 18 U.S.C. §§ 3121 *et seq.*; USA PATRIOT Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001); *see also Second R&O, supra* n.8 at 7112, ¶ 12 (citing *House Report*, 1994 U.S.C.C.A.N. at 3498); Worldcom Comments at 4.

<sup>90</sup>47 U.S.C. § 1002.

<sup>91</sup>*See infra* section III.C.

<sup>92</sup>CALEA requires telecommunications carriers to ensure that "equipment, facilities or services" that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of providing authorized surveillance to LEAs. *See* 47 U.S.C. § 1002(a).

<sup>93</sup>*See supra* ¶ 7. Law Enforcement states that the scope of CALEA's definition of "telecommunications carrier" is broader than, and does not rely upon, the definition of "telecommunications carrier" in the Communications Act. *See* Petition at 9; Law Enforcement Reply Comments at 29; *see also* Verizon Comments at 4; NYSAG Comments at 13. Certain commenters, on the other hand, insist that the definitions in the two statutes must be interpreted identically. *See, e.g.*, ISP CALEA Coalition ("ISPC") Comments at 15-18; Earthlink, Inc. ("Earthlink") Comments at 4-5; Global Crossing Comments at 3-4; ITI Comments at 5-6; Covad Comments at 8-9; AT&T Comments at 10-12; Level 3 Communications, LLC ("Level 3") Reply Comments at 3-4; Industry at 3; Warriner, Gesinger & Associates, LLC Comments at 2-3, 5.

<sup>94</sup>CALEA provides that the term "telecommunications carrier":

(A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and

(continued....)

41. We tentatively conclude that Congress intended the scope of CALEA's definition of "telecommunications carrier" to be more inclusive than that of the Communications Act. We base this tentative conclusion on the facial differences in the statutory language discussed below.<sup>95</sup> We acknowledge the Commission's previous statement that it expected "in virtually all cases that the definitions of the two Acts will produce the same results."<sup>96</sup> In making that statement, however, the Commission foreshadowed the possibility that the definitions under each of the two statutes may differ when it also concluded that it is "a matter of law that the entities and services subject to CALEA *must be based on the CALEA definition* . . . independently of their classification for the separate purposes of the Communications Act."<sup>97</sup> We seek comment on our analysis. Below we ask parties to address the precise contours of CALEA's definition of "telecommunications carrier" – in particular the meaning of the Substantial Replacement Provision.

**(i) The Substantial Replacement Provision – Section 102(8)(B)(ii)**

42. In section 102(8)(B)(ii) –the Substantial Replacement Provision – Congress explicitly directs the Commission, after making certain findings, to deem the following entities telecommunications carriers for CALEA purposes:

a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA].<sup>98</sup>

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(B) includes –

(i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))); or

(ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunication carrier for purposes of this title; but

(C) does not include --

(i) persons or entities insofar as they are engaged in providing information services; and

(ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.

47 U.S.C. § 1001(8).

<sup>95</sup> See *infra* section III.B.1.a.(i) (discussing the Substantial Replacement Provision); *supra* ¶ 7 (noting, among other things, that unlike the Communications Act definition, CALEA's definition of telecommunications carrier includes an entity engaged in "transmission or switching"). 47 U.S.C. § 1001(8)(A) (emphasis added).

<sup>96</sup> See *Second R&O*, *supra* n.8 at 7112, ¶ 13; see also AT&T Comments at 10-12.

<sup>97</sup> See *Second R&O*, *supra* n.8 at 7112, ¶ 13 (emphasis added).

<sup>98</sup> 47 U.S.C. § 1001(8)(B)(ii).

In the past, the Commission has never before exercised its section 102(8)(B)(ii) discretion to identify additional entities that fall within CALEA's definition of "telecommunications carrier."<sup>99</sup> Moreover, it has never, until now, solicited comment on the discrete components of this subsection or on specific classes of entities to which this subsection might apply.<sup>100</sup> We therefore seek comment below on what criteria we should apply to deem an entity a "telecommunications carrier" under the Substantial Replacement Provision and to which services CALEA should apply. In identifying services that may be covered under the Substantial Replacement Provision, we ask commenters to identify those entities associated with or "engaged in providing" such services and to what extent those entities have the information LEAs seek to obtain when conducting electronic surveillance.

43. We address the three articulated components of the Substantial Replacement Provision in turn. First, we seek comment on the phrase "engaged in providing wire or electronic communication switching or transmission service."<sup>101</sup> Because of Congress's stated purpose to require compliance with CALEA "with respect to services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communication,"<sup>102</sup> we read the phrase "switching or transmission service" broadly here. Specifically, we interpret "switching" in this section to include routers, softswitches,<sup>103</sup> and other equipment that may provide addressing and intelligence functions for packet-based communications to manage and direct the communications along to their intended destinations. These functions are similar to the switching functions in a circuit-switched network and thus we believe CALEA's explicit inclusion of the word "switching" is meant to include these capabilities. With regard to "transmission," we note that CALEA *does not* limit "transmission" in section 102 to transmission "without change in the form or content of the information as sent or received,"<sup>104</sup> as does the Communications Act.<sup>105</sup> Thus, we would

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<sup>99</sup>See *Second R&O*, *supra* n.8 at 7120, ¶ 29.

<sup>100</sup>The initial CALEA *Notice of Proposed Rulemaking* ("NPRM") asked commenters to identify any cases they believed warranted Commission action under section 102(8)(B)(ii) to the extent those commenters disagreed with the Commission's proposal in the NPRM to decline to exercise its discretion under section 102(8)(B)(ii) at that time. *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Notice of Proposed Rulemaking*, 13 FCC Rcd 3149 (1998) at 3162, ¶ 18.

<sup>101</sup>47 U.S.C. § 1001(8)(B)(ii); *see also* 47 U.S.C. § 1001(8)(A).

<sup>102</sup>*See* 47 U.S.C. § 1002(a); *House Report*, 1994 U.S.C.C.A.N. at 3498 (Narrow Scope Section).

<sup>103</sup>*See* Harry Newton, *Newton's Telecom Dictionary* 687-88 (19th ed. 2003) (definition of "router"); *id.* at 738 (definition of "softswitch"). While equipment that provides addressing or intelligence functions may not technically be switching or transmission equipment, access to such equipment may be essential for LEAs to access call-identifying information to which they are entitled.

<sup>104</sup>Law Enforcement asserts that a change in form or content is irrelevant for CALEA as long as a transmission or switching function exists. *See* Petition at 13. We agree. We note that the term "telecommunications" under the Communications Act requires "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

<sup>105</sup>The Commission has recently recognized that a number of new packet-based service offerings are currently available and it is not clear which of those services involve "a change in the form or content of the information as sent or received," for purposes of the Communications Act. For example, the Commission has tentatively concluded that wireline broadband Internet access service is an information service under the Communications Act when provided over an entity's own facilities, and that the underlying transmission component of such service constitutes "telecommunications" and not a "telecommunications service" under the Communications Act. *See Wireline Broadband NPRM*, *supra* n.81 at 3032-33, ¶¶ 24-25. In addition, the (continued....)

interpret the "switching or transmission" component of the Substantial Replacement Provision to include entities that provide the underlying broadband transmission capability of Internet access services. We seek comment on this analysis and inquire specifically what types of "switching or transmission" satisfy this component of the Substantial Replacement Provision.

44. Second, we consider the meaning of the phrase "a replacement for a substantial portion of the local telephone exchange service." We tentatively conclude that the phrase "a replacement for a substantial portion of the local telephone exchange service" reaches the replacement of any portion of an individual subscriber's functionality previously provided via POTS, e.g., the telephony portion of dial-up Internet access functionality when replaced by broadband Internet access service. We acknowledge that the statutory phrase contains some ambiguity,<sup>106</sup> and are therefore guided by the statutory purposes to "preserve" LEAs' surveillance capabilities in the face of changing technologies<sup>107</sup> and an accelerating adoption of packet-based services in lieu of circuit-switched ones.<sup>108</sup> Keeping in mind Congress's intent to "preserve" surveillance capabilities, we note that at the time CALEA was enacted, the local exchange telephone network served two distinct purposes. First, it was the means to obtain POTS that enabled customers to make voice-grade telephone calls to other customers within a defined service area, i.e., the local telephone exchange area.<sup>109</sup> Second, it was (and still is to a large extent) the access conduit to many

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Commission has recently determined the legal classification under the Communications Act of two different types of VoIP offerings. See *Pulver.com Declaratory Ruling*, supra n.84 (declaring pulver's Internet application, Free World Dialup, an information service because, *inter alia*, it changes the form of the information as sent and received); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457 (2004) (*AT&T Declaratory Ruling*) (declaring AT&T's IP-in-the-middle long distance service a telecommunications service); see also *IP-Enabled Services Notice*, supra n.1 at 4886-4890, ¶¶ 35-37 (seeking comment on a broad range of IP-enabled services and the appropriate legal classification under the Communications Act).

<sup>106</sup>While we read CALEA as enabling a determination of substantial replacement to apply on an individual basis, we inquire whether the phrase "within a state" which appears in the accompanying *House Report* has any material significance to our determination of whether a service is a substantial local exchange replacement. See *House Report*, 1994 U.S.C.C.A.N. at 3500 (Section-by-Section Analysis). Compare Verizon Comments at 5 n.3 (indicating that "replacement for a substantial portion" can not reasonably be construed to impose market share or geographical reach; it can only reasonably be understood in functional terms) with ISPPCC Comments at 20-21; Net2Phone Reply at 14 (asserting that substantial replacement for CALEA means actual replacement for all aspects of traditional legacy local exchange service in a particular state, not simply a portion of local service functionality for certain individuals); see also AT&T Comments at 16-17; Industry and Public Interest ("IPI") Reply Comments at 4.

<sup>107</sup>See H.R. Rep. No. 103-827(I) (1994), reprinted in 1994 U.S.C.C.A.N. 3489 (*House Report*) (Summary and Purpose) (stating "The purpose of H.R. 4922 is to preserve the government's ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies such as digital or wireless transmission modes..."); see also supra ¶ 3; NYSAG Comments at 2 (indicating that the focus of CALEA was the preservation of surveillance capability in the changing communications marketplace).

<sup>108</sup>Law Enforcement suggests that packet networks may ultimately supplant circuit-switched networks altogether. See *Petition* at 18.

<sup>109</sup>The Communications Act uses the term "telephone exchange service" as one of the services listed in the definition of "local exchange carrier." See 47 U.S.C. § 153(26) (identifying "telephone exchange service" and "exchange access" as the two services for which the provider is considered a "local exchange carrier" under the Communications Act). The term "local exchange carrier" means "any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is (continued....)